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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRUCE BURGESS, Defendant and Appellant.	B213401 (Los Angeles County Super. Ct. No. BA336373)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Bruce Burgess of forcible rape (§ 261, subd. (a)(2)),[1] kidnapping (§ 207, subd. (a)), and inflicting corporal injury on a former spouse (§ 273.5, subd. (a)). The victim of the three offenses was defendant's former wife, Marion B. The trial court imposed an aggregate sentence of six-years.

In this appeal, defendant contends that the trial court abused its discretion in permitting the prosecution to introduce evidence of three uncharged offenses he committed against Marion B.: two separate acts of rape and one act of domestic violence. We find no abuse of discretion. Defendant next contends that the pattern instructions explaining how the jury can use evidence of uncharged offenses are inaccurate as a matter of law because the instructions require that the uncharged offenses be proven by a preponderance of the evidence instead of beyond a reasonable doubt. Precedent compels rejection of that contention. Lastly, defendant contends prejudicial error occurred because the trial court did not instruct about the lesser included offenses of attempted kidnapping and false imprisonment. We find that the doctrine of invited error precludes consideration of the claim and, in any event, any error which may have occurred was not prejudicial. We therefore affirm the judgment.

STATEMENT OF FACTS

1. *Background Information*

Defendant and Marion B. were married in 1993 and divorced in June 2007. They have two daughters, one born in 1994 and the other born in 2000. At the

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[1] All undesignated statutory references are to the Penal Code.

time of the crimes, they were no longer living together because Marion B. had moved with their daughters to a new home in 2005.

Initially, Marion B. cooperated with law enforcement in prosecuting defendant. However, at trial she testified that no crimes had occurred. Consequently, the rape was established through introduction of her prior statements that defendant had raped her. (Evid. Code, § 1235.) Marion B. had made these statements to the prosecutor, a police officer, a deputy sheriff, a sexual assault nurse, and a detective. Some of the statements were made in a taped interview introduced into evidence. The kidnapping and spousal abuse[2] were likewise established through her prior statements made in a taped interview with the prosecutor as well as statements made to a police officer and a detective. In addition, two individuals who had observed defendant commit the kidnapping and spousal abuse testified.

Further, the trial court, in an exercise of its discretion, permitted the prosecutor to introduce evidence of three uncharged offenses. (Evid. Code, §§ 1108, 1109.)

2. *The Rape on October 6, 2007*

During the mid-afternoon of October 6, 2007, Marion B. returned home from the market. As she was taking groceries into the house from her car, defendant surprised her from behind, placed his hand over her mouth, and forced her into the garage. Once inside the garage, he locked the door, put his hand on her throat and threatened to kill her. The two struggled but defendant overcame Marion B.'s resistance. He undressed her and fondled her breasts, orally copulated

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[2] For purposes of clarity, we shall refer to defendant's conviction for inflicting corporal injury upon a former spouse as spousal abuse.

her and forcibly raped her. After he completed his sexual assaults, he directed her to go with him into the house and "to act like everything's okay."

They entered the house where their two daughters were playing. Marion B. ultimately convinced defendant that they needed to buy a book for one of their daughters who was preparing a book report. Defendant drove Marion B. and his children to a Borders book store.

At the book store, Marion B. approached a clerk and told him: "I've been kidnapped. Call 911. I need the police." Scott Johnson, the store manager, was informed of the situation. He approached Marion B. who appeared "very frantic, paranoid even." She asked Johnson to call the police because she feared her husband. Shortly thereafter, law enforcement arrived at the bookstore. Marion B. told the police: "Help me. Help me." Los Angeles Police Officer Matthew McNulty, one of the responding officers, saw a "small cut or laceration to her upper lip, and . . . two scratch marks on her left hand with some dried blood." She told Officer McNulty that defendant had raped her and described how it had happened.[3]

Defendant was placed under arrest. Marion B. and her children were transported to the police station. There, she was interviewed by Los Angeles Deputy Sheriff Lisa Joyce. Marion B. told Deputy Joyce about the events leading up to and culminating in her rape by defendant. Marion B. agreed to a sexual assault examination. Deputy Joyce took her to the Santa Monica U.C.L.A. Rape Treatment Center where she was examined by Kisha Lawson, a registered nurse. Marion B. told Lawson about the sexual assault and forcible rape, providing the

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[3] Officer McNulty testified: "She [Marion B.] stated that she was coming home from the grocery store and that she pulled into the garage. The defendant came up from behind, placed his hand over her mouth and then took her into the garage and raped her."

same details she had earlier told Officer McNulty. (See fn. 3, *ante*.) Lawson's physical examination of Marion B. revealed injuries consistent with physical assault and forcible rape, including the presence of sperm in her vagina.

On February 14, 2008, the prosecutor conducted two tape recorded interviews with Marion B. (the February 14th interviews). Deputy Mason was present at one and Detective Matthew Maffei was present at the other. The tapes were played for the jury and transcripts of the interviews were introduced into evidence. In the interview with Deputy Mason, Marion B. described, in a manner consistent with the statements she had given earlier, the details of the rape.

3. *The Kidnapping and Spousal Abuse on February 8, 2008*

During the evening of February 8, 2008, Marion B. and Dexter Daniels (who Marion B. had met through a dating website) were seated in her parked car. Daniels' car was nearby. Defendant unexpectedly appeared, opened the passenger door, grabbed Daniels, and stated he wanted to speak with Marion B. Daniels got out of the vehicle. Although Daniels could have left in his car, he decided to walk across the street and stay because he "was concerned for [Marion B.'s] safety." Defendant and Marion B. conversed in her car for awhile but soon left the vehicle. Daniels saw them walk down the street together until Marion B. began to "resist" defendant. Defendant responded by grabbing her arm and pulling her down the street; Marion B. screamed for defendant to stop. Defendant dragged her to his car, forced her inside and locked the door. According to Daniels, defendant dragged Marion B. "about 50 yards."

Mark Thornton came upon the scene during these events. At first he saw defendant walking with his hand around Marion B.'s shoulder but then he saw Marion B. drop to the ground whereupon defendant began to drag her down the street. Marion B. was "[s]creaming, kicking, basically trying to get away" and

pleading "Please help me." Defendant "shove[d]" her into his car and closed the door. Thornton approached defendant's car and told him to release Marion B.[4] Marion B. told Thornton that "[s]he did not want to go with him [defendant] by any means." At that point, Thornton called the police on his cell phone. This diversion allowed Marion B. to escape from the car.[5] She asked Thornton to call the police. "[S]he was really shaken up" and "really emotionally upset."

Defendant left the scene shortly before Los Angeles Police Officer Jonathan Gan arrived. According to Officer Gan, Marion B. was "nervous, distraught" and "crying." She told the officer that defendant had "grabbed her by the neck and arms and dragged her" to a parked car where he "forced her into his vehicle." In addition, Marion B. told him that "due to the previous occurrence how the suspect was following her, she was afraid that something could happen to her, and . . . that she was afraid for her safety." Based upon his observation of the scene and what he had been told, Officer Gan believed defendant had dragged Marion B. "about 50 yards." (Thornton, on the other hand, testified that he saw defendant drag her "about 15, 20 feet" and *also* take "her against her will" "[a]bout the same" distance.)

On February 11 (three days after the kidnapping and spousal abuse), Detective Maffei met with Marion B. He reviewed with her Officer Gan's police report about the incident. She said the report (which was not introduced into evidence) was accurate. She stated she was prepared to cooperate in prosecuting defendant. Detective Maffei took photographs of Marion B., which were introduced into evidence at trial, showing the bruises defendant had inflicted when

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[4] Another man (unidentified in the record) assisted Thornton.

[5] Daniels left the scene shortly after Marion B. escaped from defendant's car. He heard her screaming "Help me" as she ran from defendant.

he had dragged her to his car. Marion B. told the detective that because she "was fearful for her life," she wanted to obtain a restraining against defendant.

As set forth earlier, on February 14, the prosecutor and Detective Maffei conducted a tape recorded interview of Marion B. In the interview, Marion B. described how defendant had forcibly dragged her to and pushed her into his car. She estimated he had dragged her about 10 car lengths.

4. *The Uncharged Offenses*

a. *The February 1997 Rape*

To establish that defendant had raped Marion B. in 1997, the prosecutor introduced into evidence an application that Marion B. had filed on February 26, 1997 seeking a restraining order against defendant.[6] Marion B. signed the application under the penalty of perjury. In it, Marion B. wrote, in relevant part: "2/07/97 – [Defendant] went out drinking with friends[,] came home approximately 2:00 am. Pulled me out of bed, dragged me to living room sofa. Then he proceeded to rip my clothing[,] slapping me in the face about 4 times during the process. *He then raped me* and stated that he will continue to treat me like the whore that I am. My 2 year old daughter was sleeping in the bedroom during this 15 minute period. This incident resulted in bruises to my face and legs and prevented me from going to work the next day." (Italics added.)

In addition, the prosecution offered evidence of the February 14th interview. In that interview Marion B. had not only set forth the details of the October 2007 rape and the February 2008 kidnapping and spousal abuse, but she also recounted the details of previous uncharged crimes committed by defendant. In particular,

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[6] On our own motion, we have augmented the record on appeal to include all of the exhibits introduced into evidence at trial. (Cal. Rules of Court, rule 8.155 (a)(1)(A).)

she spoke about the February 1997 rape, giving details consistent with the description she had set forth in her application for a restraining order.

b. *The December 2006 Rape*

To establish that defendant had raped Marion B. in December 2006, the prosecutor first introduced into evidence the application that Marion B. had filed on December 27, 2006 seeking a protective order from defendant. (See fn. 6, *ante*.) Marion B. had signed the application under the penalty of perjury. In it, she wrote, in relevant part, that earlier that month, "[defendant] took me to a hotel under the impression that we were going to an anger management program to help him. He had prepaid for a room and instead took me to a room. [The next portion is redacted by court order.] I was threatened as [defendant] had also brough[t] a knife and threatened to kill himself if he cannot have his family back."

To establish that defendant had raped Marion B. during that encounter, evidence was offered that Marion B. had told her long-time friend Arille Overton about the rape.[7] In addition, the prosecution relied upon the February 14th interview in which Marion B. stated that defendant had raped her in the hotel room.

c. *The December 2006 Spousal Abuse*

To establish this instance of spousal abuse, the prosecutor relied upon Marion B.'s December 27, 2006 application for a protective order described above.

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[7] When the prosecutor called Overton as a witness, she denied that Marion B. had ever told her that defendant had raped her in the hotel room. However, Overton was subsequently impeached by the testimony of Deputy Sheriff Nondice Mason. Deputy Mason spoke with Overton on February 21, 2008 (almost two weeks after the kidnapping and spousal abuse). In that conversation, Overton told Deputy Mason that Marion B. had told her (Overton) about the December 2006 rape the day after it had occurred.

In the section asking her to set forth the most recent abuse that had made her afraid of defendant, she wrote that on December 23, 2006 defendant made a "verbal threat[,] h[e]ld me around my neck, left marks[,] took all phones in my house so I cannot call 4 help[, and made me] text my sister to avoid a visit from family." When asked to describe threats or weapons, she wrote defendant "once had a knife and threatened to kill himself." Marion B. explained that as a result of the assault, she had "finger scratches around [her] neck."

5. *Marion B.'s Testimony*

Although Marion B. initially cooperated in prosecuting defendant, she later declined to do so. Detective Maffei testified that he spoke with Marion B. "from 25 to 40 times" in the ten months between the February 2008 crimes and trial. At no point did she ever deny that defendant had forced her to his car and injured her during that incident. However, at some point, she told the detective that "she was not willing to proceed with the case based on the fact that she was fearful her kids would be without a father and that she was willing to sacrifice her safety for her kids having a father." In addition, in March 2008, Marion B. sent the prosecutor an email stating: "I no longer wish to pursue this case against my ex-husband, [defendant] Bruce Burgess. If it is my choice, I would prefer not to be involved in any preliminary hearing or trial. Family matters and situation with my children has come up impacting this decision."

At trial, the prosecutor called Marion B. as a witness. Marion B. either denied having made any statements incriminating defendant or claimed to not recall having made those statements. She testified that the sexual intercourse with defendant in the garage on October 6, 2007 was consensual. In a similar vein, she testified that on February 8, 2008, she did not "feel" that she was "kidnapped." Defendant did not drag her or force her to his car and she never feared for her

safety that evening. According to her, defendant "didn't kidnap [her] or beat [her] up on February 8." She also denied the uncharged rape committed in the hotel in December 2006; she testified the sexual intercourse was consensual.

6. *The Defense Case*

Defendant did not testify. He offered the testimony of Merry Carol Parente, a sexual assault examiner. Pursuant to a request from the police, Parente examined defendant the evening he was arrested for the October 6, 2007 rape. Parente testified that her examination *of him* disclosed no physical evidence (e.g., scratches, blood) to support Marion B.'s claim that he had raped her.

7. *Sentencing*

The court selected the rape conviction as the principal term and imposed the midterm of six years. It imposed a concurrent five-year sentence for the kidnapping conviction and a concurrent three-year sentence, stayed pursuant to section 654, for the spousal abuse conviction.

DISCUSSION

A. EVIDENCE OF UNCHARGED OFFENSES

Defendant contends that the trial court abused its discretion in permitting the prosecutor to offer evidence about the two uncharged rapes and the one uncharged act of domestic violence. We disagree.

1. *Factual Background*

Prior to trial, the prosecutor filed a written motion to introduce prior uncharged acts of domestic violence perpetrated by defendant on Marion B. Defense counsel filed opposition.

At the hearing conducted to determine the matter, the prosecutor briefly set forth the facts of eight incidents which had occurred from 1995 through 2007.

Defense counsel objected, arguing the evidence would be "extremely prejudicial" and "blind the jury really to what happened in the present case." He claimed that "[t]here's no independent witness that saw any of these acts, and [defendant] was never prosecuted for any of these acts." In addition, he urged that the incidents in 1995, 1996 and 1997 were "remote in time."

The trial court ruled that it would "allow some but not all." The first was the February 1997 incident in which defendant came home, dragged Marion B. out of bed, ripped her clothes off and raped her after which Marion B. sought a restraining order. The court found the incident to be "highly probative under [Evidence Code section] 1109" and "not unduly prejudicial." Next, the court held that the prosecutor could present evidence that in December 2006, defendant tricked Marion B. into accompanying him to a hotel room where he raped her. The court found evidence of this offense to be "highly probative." Lastly, the court ruled that the December 2006 incident in which defendant made verbal threats to Marion B., held her down by the neck, removed the phones so she could not call for help, and threatened to kill himself was probative. The court precluded the prosecution from presenting evidence of any of the other five incidents, finding them either too remote, unduly prejudicial, or having little probative value.

2. *Discussion*

"The enactment of [Evidence Code] sections 1108 and 1109 created an exception in sex offense and domestic violence cases to the long-standing common law and statutory rule excluding propensity evidence. [Citation.] Our Supreme Court has held that due process is not offended when the trial court determines the probative value of the propensity evidence outweighs its prejudicial effect, and

properly instructs the jury on the presumption of innocence and the prosecution's burden of proof. [Citations.]" (*People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. omitted.) In subjecting evidence of an uncharged offense to the weighing process of Evidence Code section 352, the trial court considers, among other things, its similarity to the charged offense(s), the possible remoteness of the evidence, the degree of certainty of its commission, the amount of time it will take to establish its commission, the likelihood of distracting the jury from its main inquiry, and the extent to which the evidence is needlessly inflammatory. The trial court's ruling permitting the prosecution to introduce evidence under either of these statutes is reviewed for an abuse of discretion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-923 [Evid. Code, § 1108]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1337-1338 [Evid. Code, § 1109].)

Here, we find no abuse of discretion. Because Marion B.'s in-court testimony attempted to absolve defendant of any criminal liability, the primary issue for the jury to decide was whether to credit that testimony or, instead, to credit her many statements made before trial in which she accused defendant of committing the charged offenses. This circumstance warranted admission of defendant's commission of other similar uncharged offenses. (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.) That Daniels and Thornton witnessed the kidnapping and spousal abuse does not change our conclusion. Marion B. testified that defendant did not kidnap her or "beat [her] up" that evening, thus making evidence of defendant's prior crimes all the more probative in proving the charged crimes. Further, the fact that the uncharged February 1997 rape was committed in a manner similar to the charged October 2007 rape sufficiently outweighed the fact that it was committed more than 10 years prior. In addition, the facts about defendant's commission of the two uncharged rapes and domestic violence were no more inflammatory than the evidence presented about the charged offenses.

Because the evidence offered to establish the uncharged offenses was simply and clearly presented through Marion B.'s applications for restraining orders, Marion B.'s tape recorded February 14th interviews, and the testimony of Deputy Mason (see fn. 7, *ante*), court time was not unduly consumed and the jury was not confused by being required to resolve contested tangential issues. Lastly, given the care with which the trial court treated the evidence, carefully considering each of the eight incidents offered by the prosecutor but allowing her to present evidence about only three of them, we find no abuse of discretion in the trial court's ultimate decision that those three incidents had probative value which was not outweighed by the danger of undue prejudice.

Defendant's contrary arguments (not already addressed in the preceding paragraph) are not persuasive.

First, defendant urges that it was unfair to require him to defend against uncharged offenses "based solely on the alleged victim's accusations that were not corroborated by any physical or independent evidence." We disagree. Through cross-examination of Marion B., defense counsel was given the opportunity to undermine the veracity of her earlier claims and, in fact, succeeded in having her recant her prior claim that defendant had raped her in the hotel room in December 2006.

Next, defendant urges that it was error to introduce evidence of the uncharged domestic violence incident of December 2006 because that "uncharged offense [was] wholly unrelated" to the charged offenses of rape and kidnapping. Defendant did not raise this argument in the trial court. Further, he did not object to the trial court's instructing the jury, among other things: "If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude

that the defendant was likely to commit rape, kidnapping and domestic battery, as charged here." Defendant's failure to raise this argument in the trial court constitutes a forfeiture of his right to raise it on appeal. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13.)

In any event, defendant's claim lacks merit. Evidence Code section 1109, subdivision (a)(1) permits admission of evidence of an uncharged act of domestic violence if defendant "is accused of an offense involving domestic violence." Consequently, the issue is whether rape and kidnapping are offenses involving domestic violence. They are. Subdivision (d)(3) of Evidence Code section 1109 provides: "'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code." Subdivision (b) of section 13700 provides that domestic violence "means abuse committed against an adult . . . who is a spouse." Subdivision (a) of section 13700 defines abuse as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to . . . herself." Precedent holds that forcible rape constitutes an offense involving domestic violence within the meaning of this statutory framework. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138-1139.) By a parity of reasoning, so does kidnapping: it is an intentional act that places the victim in reasonable apprehension of serious bodily injury. Because both rape and kidnapping are offenses involving domestic violence within the meaning of Evidence Code section 1109, the trial court did not abuse its discretion in admitting evidence of the prior uncharged December 2006 act of domestic violence and instructing the jury that it could consider that evidence in deciding whether defendant committed the charged rape and kidnapping. (*Id*. at p. 1139 ["[R]ape is a higher level of domestic violence, a similar act of control"].)

B. SUBMISSION OF THE PATTERN INSTRUCTIONS ABOUT UNCHARGED OFFENSES

Defendant next attacks the submission of the pattern CALCRIM instructions which informed the jury that it could consider the evidence of the uncharged crimes if the prosecution proved their commission by a preponderance of the evidence. Claiming that the applicable standard of proof for evidence of uncharged offenses is beyond a reasonable doubt, he argues that use of these instructions constituted prejudicial error. The contention lacks merit.

With defense counsel's acquiesance,[8] the trial court submitted CALCRIM Nos. 852 ("Evidence of Uncharged Domestic Violence") and 1191 ("Evidence of Uncharged Sex Offense"). Each instruction explained to the jury that it could not consider the evidence of the uncharged offenses (spousal abuse and rape) unless it found that the People had proved by a preponderance of the evidence that the defendant had, in fact, committed the uncharged offenses. CALCRIM No. 1191 further explained: "If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit rape, as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of rape.

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[8] During the discussion about jury instructions, the prosecutor stated: "We also need the preponderance of the evidence instruction." Defense counsel responded: "*She's right about that because of the 208 [sic] and 209 [sic] evidence*." (Italics added.) The trial court noted that principle was explained in CALCRIM No. 852 which it intended to submit. The court then read the relevant portion of the instruction to counsel.

The People must still prove each charge beyond a reasonable doubt." CALCRIM No. 852 used identical language to explain how the jury could (but was not required) to use the evidence of the uncharged domestic violence.

Defendant's contention that it was prejudicial error to submit these two instructions relies first upon the principle that before a jury can find a defendant guilty based upon circumstantial evidence, "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (CALJIC No. 2.01 ["Sufficiency of Circumstantial Evidence"].) Defendant then notes that evidence of an uncharged offense (when properly admitted) is circumstantial evidence of a propensity to commit the class of crime charged. (See, e.g., *People v. Reliford* (2003) 29 Cal.4th 1007, 1013; *People v. Falsetta, supra*, 21 Cal.4th at p. 915.) From these principles, he argues that the jury should have been instructed that the evidence of the other crimes had to be proven beyond a reasonable doubt (as opposed to a preponderance of the evidence) before the jury could consider it as circumstantial evidence that he committed the charged offenses. Precedent is clearly to the contrary.

In *People v. Carpenter* (1997) 15 Cal.4th 312, the California Supreme Court considered the standard of proof to be applied to "other crimes" evidence. Noting that the United States Supreme Court, interpreting the Federal Rules of Evidence, has adopted the preponderance standard, our state's highest court concluded that the "preponderance of the evidence standard adequately protects defendants. Once the other crimes evidence is admitted, whatever improper prejudicial effect there may be is realized whatever standard is adopted. If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered. [Citations.] The preponderance standard is also consistent with the rule stated in Evidence Code

section 115 that 'Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.'" (*People v. Carpenter, supra*, 15 Cal.4th at p. 382; see also *People v. Medina* (1995) 11 Cal.4th 694, 762-764 [citing decisional law which has consistently held that uncharged offenses may be proved by a preponderance of the evidence] and 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 81, pp. 416-417 and cases cited therein [evidence of other crimes "may be shown by a preponderance of the evidence, and need not be established beyond a reasonable doubt"].)

People v. Van Winkle (1999) 75 Cal.App.4th 133, relying upon *People v. Carpenter, supra,* rejected a contention essentially identical to that now raised by defendant. It explained: "[P]rior sexual offenses proved by a preponderance of the evidence may be used to infer that the defendant committed the current sexual offense, as long as the current offense is proved beyond a reasonable doubt. While ultimate/elemental facts (the current offense) must be proved beyond a reasonable doubt because they *necessarily* prove the elements of the crime, basic/evidentiary facts (such as prior offenses) may be proved by a preponderance of the evidence. [Citations.]" (*People v. Van Winkle, supra,* 75 Cal.App.4th at pp. 146-147; accord: *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061.)

Further, while we note that CALCRIM No. 224 ("Circumstantial Evidence: Sufficiency of Evidence") was submitted in this case,[9] decisional law suggests that

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[9] CALCRIM No. 224 provides:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points

this is not the type of case in which it should be given. The instruction "is proper only when the prosecution relies on circumstantial evidence to prove the defendant's guilt from a pattern of incriminating circumstances, not when circumstantial evidence serves solely to corroborate direct evidence. [Citations.] Here, the prior domestic violence [and uncharged rapes] evidence merely corroborated the direct evidence of the charged offense[s] provided by [Marion B.'s out-of-court statements and the eyewitness testimony of Thornton and Daniels]. In such a case prior offenses may be established by a preponderance of the evidence. [Citation.]" (*People v. James*, *supra,* 81 Cal.App.4th at p. 1360, 1358-1359, fn. 9; see also Bench Notes to CALCRIM No. 224.)

C. INSTRUCTIONAL ERROR RE LESSER INCLUDED OFFENSES

Defendant contends that his kidnapping conviction must be reversed because the trial court did not instruct on the lesser included offenses of attempted kidnapping and false imprisonment. We are not persuaded.

1. *Factual Background*

During a conference about jury instructions, the parties first discussed the kidnapping charge. The issue was whether the jury should be instructed on what constitutes a "substantial distance" within the meaning of the crime of kidnapping. During this colloquy, defense counsel, without any elaboration, requested an instruction on false imprisonment. The trial court took a brief recess to read *People v. Martinez* (1999) 20 Cal.4th 225, a case addressing the asportation requirement of kidnapping. When proceedings resumed, the court indicated,

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to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

among other things, that it would instruct that in order to convict defendant of kidnapping, the jury must find that Marion B. was "moved or made to move a distance beyond that merely incidental to the commission" of the spousal abuse charge. Defense counsel replied: "*Your Honor, with that, we're going to withdraw our request for false imprisonment*." (Italics added.) The prosecutor stated: "I don't believe that this case is a false imprisonment." The prosecutor conceded that both false imprisonment and attempted kidnapping were lesser included offenses to kidnapping but indicated "the People aren't asking for them." The judge stated: "I'm thinking now whether I should give the lesser includeds on the kidnapping. [¶] Don't I have to give lesser includeds if they're shown by the evidence?" Defense counsel responded: "*I think only if they're requested, Your Honor*." (Italics added.) When the trial court subsequently instructed the jury, it did not instruct about either attempted kidnapping or false imprisonment. However, it did accede to defense counsel's request to instruct that spousal battery (§ 243, subd. (e)(1)) is a lesser included offense to the charge of spousal abuse. (CALCRIM No. 841.)

2. *Discussion*

As indicated in the Bench Notes to CALCRIM No. 1215 ("Kidnapping") both attempted kidnapping and false imprisonment are lesser included offenses to the charge of kidnapping. (*People v. Fields* (1976) 56 Cal.App.3d 954, 955-956 [attempted kidnapping]; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [false imprisonment].) Nonetheless, we find that defendant's contention of instructional error is barred by the doctrine of invited error and that, in any event, any error which may have occurred was not prejudicial.

"Despite the circumstance that it is the *court* that is vested with authority to determine whether to instruct on a lesser included offense, the doctrine of invited

error still applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given. Such a tactical decision presents a bar to consideration of the issue on appeal." (*People v. Prince* (2007) 40 Cal.4th 1179, 1265.) This principle applies even if the evidence supports instructing on lesser included offenses (*People v. Horning* (2004) 34 Cal.4th 871, 905; *People v. Barton* (1995) 12 Cal.4th 186, 198) or if defense counsel's tactical decision is based on a misunderstanding of the law. (*People v. Cooper* (1991) 53 Cal.3d 771, 830-831.)

In this case, review of defense counsel's closing argument shows that he had a tactical reason to affirmatively withdraw his request for a false imprisonment instruction and not to request an instruction on attempted kidnapping. We explain.

In regard to the rape charge, defense counsel argued that the prosecutor had failed to establish defendant's guilt of the rape beyond a reasonable doubt. He minimized the significance of Marion B.'s prior statements by emphasizing that they were "unsworn" and downplayed the incriminating evidence offered against defendant by noting what additional evidence had not been presented. But in regard to the kidnapping and spousal abuse charges, he could not take that approach. Because he had to deal with the eyewitness testimony of Daniels and Thornton, he could not simply rely upon Marion B.'s in-court recantation to argue that the prosecution had failed to establish guilt beyond a reasonable doubt. Once the trial court agreed to instruct the jury that in order to convict of kidnapping it had to find that defendant moved Marion B. "a distance beyond that merely incidental to the commission" of the spousal abuse, counsel made the tactical decision to focus on the distance that she had been moved to argue it was simply incidental to the domestic violence charge. On that basis, he argued there was no

kidnapping.[10] In other words, he argued that if any crime was committed, it was a domestic violence offense, not kidnapping. But if the court had instructed about attempted kidnapping or false imprisonment, defense counsel ran the risk that the jury could compromise by finding defendant guilty of a lesser included offense. In sum, "[a]s far as we are concerned, the record fairly compels the conclusion that the [request not to instruct on the lesser included offenses] was a tactical decision which, unfortunately, from the defense point of view, backfired." (*People v. Aguilar* (1973) 32 Cal.App.3d 478, 485.) The doctrine of invited error therefore bars defendant from contending that the failure to instruct on the two offenses constitutes reversible error.

Defendant attempts to avoid this conclusion by arguing that defense counsel's decision to forgo the two instructions constituted ineffective assistance of counsel. The argument is not persuasive. To prevail upon a claim of ineffective assistance, "defendant would have to prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and

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[10] Defense counsel stated to the jury: "[T]he real question becomes is that a domestic violence situation or is it really a kidnapping? . . . [¶] And at first it [Marion B.'s walking with defendant] was voluntary, and then it starts getting to pushing. And that's when the domestic violence kicks in, Ladies and Gentlemen, as compared to kidnapping, and that's the reason why the Court gave the instruction. . . . [¶] *In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of that other crime [the spousal abuse]. . . .* [¶] *He's not a kidnapper. . . . It's not a substantial distance she's being moved. It's got to be a substantial distance and it's got to be out of the realm of domestic violence*." Defense counsel then relied upon a portion of Thornton's testimony (defendant dragged the victim 20 feet) to minimize how far defendant forcibly took Marion B. He argued: "You know, Ladies and Gentlemen, they're walking up and down the street. He wants to talk to her. Is there a better way to handle it? Of course there is, *but it's not kidnapping*. Kidnappers don't act like that. Kidnappers don't take 20 minutes to move 20 feet. . . . [¶] He's not guilty of kidnapping. . . . [¶] It's not a substantial distance she's being moved. It's got to be a substantial distance and it's got to be out of the realm of domestic violence." (Italics added.)

that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Cooper, supra,* 53 Cal.3d at pp. 831-832, citing *Strickland v. Washington* (1984) 466 U.S. 668.) Even if defendant could prove that trial counsel's decision was objectively unreasonable (a finding we do not make), he could not show prejudice for several reasons.

First, """"[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions."""" (*People v. Beames* (2007) 40 Cal.4th 907, 928.) Here, the trial court submitted the pattern instruction about kidnapping, CALCRIM No. 1215, the entire text of which is set forth below in footnote 11.[11]

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[11] The instruction reads:

"The defendant is charged in Count 2 with kidnapping in violation of Penal Code section 207(a).

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;

"2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;

"3. The other person did not consent to the movement. AND

"4. The defendant did not actually and reasonably believe that the other person consented to the movement.

"In order to consent, a person must act freely and voluntarily and know the nature of the act.

"*Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.*

In relevant part, the instruction properly explained to the jury that kidnapping required a forcible movement of Marion B. over a *substantial* distance and set forth the factors the jury could consider in deciding whether the distance was substantial. In addition, the instruction made clear that the distance that defendant moved Marion B. had to be more than that incidental to committing spousal abuse. In convicting defendant of kidnapping, the jury necessarily found that defendant had forcibly moved Marion B. a substantial distance rather than a slight or trivial distance, and that the distance was more than "merely incidental to the commission" of the domestic violence. This finding necessarily precluded a verdict on the lesser included offenses of attempted kidnapping or false imprisonment. Consequently, there was no prejudice from failing to instruct on

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"The defendant is also charged in Count 3 with domestic battery with traumatic injuries. *In order for the defendant to be guilty of kidnapping, the other person must be moved or made to move a distance beyond that merely incidental to the commission of that other crime.*

"The defendant is not guilty of kidnapping if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.

"The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if she (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

"Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it." (Italics added.)

those two offenses; defendant therefore has no tenable claim of ineffective assistance of counsel.

Defendant, nonetheless, argues: "Based on the totality of the evidence presented to the jury, as reasonable jurors, the jury could have concluded the prosecution had failed to prove kidnapping beyond a reasonable doubt and the evidence only established false imprisonment and/or attempted kidnapping. The jury could have found that the asportation distance was not substantial [citation], and the intervention of a passerby prevented a kidnapping from occurring, even though defendant may have intended to kidnap. The jury could have also reasonably found that Marion had been restrained by defendant, regardless of any intent to kidnap or not to kidnap, and therefore he falsely imprisoned Marion without committing kidnapping." The argument is not persuasive.

The evidence supporting the jury's verdict that defendant committed a kidnapping "was so relatively strong, and the evidence supporting a different outcome was so comparatively weak, that there is no reasonable probability that the claimed error affected the result." (*People v. Beames*, *supra*, 40 Cal.4th at p. 929.) Almost immediately after the kidnapping, Marion B. told Officer Gan that defendant had dragged her to his parked car and forced her into the vehicle. In her February 14th interview, she reiterated the details of her kidnapping. Further, two percipient witnesses (Daniels and Thornton) testified to the kidnapping. As for the distance defendant moved Marion B., Daniels (who observed all of the events) estimated it to be 50 yards as did Officer Gan (who based his estimate upon Marion B.'s statements to him and his observations of the scene). Thornton, who intervened to assist Marion B., estimated it to be 30 to 40 feet. And Marion B. told Detective Maffei the distance was approximately 10 car lengths. Further, moving Marion B. from the open street into a car clearly increased the risk of violence defendant could inflict on her and increased the danger to her of any escape

attempt if he succeeded in driving away with her. (See fn. 11, *ante*.) In contrast, although Marion B.'s trial testimony denied any kidnapping had occurred, nothing in her testimony (or any of the other evidence) suggested that an attempted kidnapping or a false imprisonment had been committed. In short, it is not reasonably probable that the failure to instruct on the two lesser included offenses affected the outcome of the jury's deliberations. (*People v. Prince, supra,* 40 Cal.4th at pp. 1267-1268.)

D. CUMULATIVE ERROR

Lastly, defendant contends that his three convictions should be reversed because of the cumulative effect of all his assignments of error. As explained above, we reject his claims that the trial court abused its discretion in admitting evidence of the uncharged offenses and that the jury was improperly instructed that the prosecution was required to prove the uncharged offenses only by a preponderance of the evidence. To the extent that his claim that the trial court erred in failing to instruct on two lesser included offenses is not barred by the doctrine of invited error, we have explained why any error which may have occurred was not prejudicial. A fortiori, we reject his claim of cumulative error. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1238.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.